



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 07864882

DATE: FEB. 28, 2020

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for an Advanced Degree Professional

The Petitioner, a provider of healthcare professionals, seeks to employ the Beneficiary as a controller. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based “EB-2” immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition on the ground that the Petitioner did not establish its ability to pay the proffered wage of this Beneficiary as well as the proffered wages of all the other beneficiaries of the Form I-140, Immigrant Petitions for Alien Workers (I-140 petitions), it had filed.

On appeal the Petitioner submits a brief and supporting materials and asserts that the evidence of record establishes its ability to pay all of its proffered wage obligations.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal. We find that the Petitioner has not overcome the Director's ground for denial, and in addition has not established that the Beneficiary has the requisite experience to meet the terms of the labor certification and qualify for advanced degree professional classification.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of U.S. workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. ANALYSIS

A. Petitioner's Ability to Pay the Proffered Wage

To be eligible for the classification it requests for the beneficiary, a petitioner must establish that it has the ability to pay the proffered wage stated on the labor certification. As provided in the regulation at 8 C.F.R. § 204.5(g)(2):

The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records may be submitted by the petitioner or requested by [USCIS].

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date¹ of the petition onward. In this case the proffered wage is \$117,000 per year and the priority date is February 5, 2017.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. A petitioner's submission of documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, when accompanied by a form of evidence required in the regulation at 8 C.F.R. § 204.5(g)(2), may be considered proof of the petitioner's ability to pay the proffered wage. In this case the record indicates that the Beneficiary has not worked for the Petitioner at any time since the priority date. Thus, the Petitioner has not established its ability to pay the proffered wage from the priority date onward based on wages paid to the Beneficiary.

If a petitioner does not establish that it has paid the beneficiary an amount equal to or above the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would ordinarily be considered able to pay the proffered wage during that year. When a petitioner has filed other I-140 petitions, however, it must establish that its job offer is realistic not only for the instant beneficiary, but also for its other I-140 beneficiaries. A petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic.

¹ The "priority date" of a petition is the date the underlying labor certification application is filed with the DOL. *See* 8 C.F.R. § 204.5(d). The Petitioner must establish that all eligibility requirements for the petition have been satisfied from the priority date onward.

See Matter of Great Wall, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977). Therefore, in the event of multiple beneficiaries the petitioner must demonstrate its ability to pay the combined proffered wages of this Beneficiary and every other I-140 beneficiary from the priority date of the instant petition until this Beneficiary and the other I-140 beneficiaries obtain lawful permanent resident status. *See Patel v. Johnson*, 2 F.Supp. 3d 108, 124 (D.Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries).

The record includes a copy of the Petitioner's federal income tax return, Form 1120S, U.S. Income Tax Return for an S Corporation, for 2017. It recorded net income² of \$113,885 and net current assets³ of \$569,659. If the Beneficiary were the Petitioner's only I-140 beneficiary, the net current assets figure for 2017 would establish its ability to pay the Beneficiary's proffered wage that year. However, USCIS records show that the Petitioner filed multiple I-140 petitions for other beneficiaries both before and after the instant petition. Therefore, the Petitioner must establish its ability to pay the proffered wage to this Beneficiary as well as its proffered wage obligations on the other I-140 petitions that were pending or approved as of, or filed after, the priority date of the instant petition.⁴

As no evidence of the Petitioner's proffered wage obligations on its other I-140 petitions was submitted with this petition, the Director issued a request for evidence (RFE). The Director asked the Petitioner to submit a list by receipt number of all the other I-140 petitions it had filed, the name of each beneficiary, the priority date of each petition, the status of each petition (pending, approved, denied, or on appeal), and whether any beneficiary had obtained lawful permanent resident (LPR) status. In addition, the Director asked for documentary evidence showing that the Petitioner paid the proffered wage to each I-140 beneficiary from the priority date onward (as well as evidence of its total employee roster). Responding to the RFE the Petitioner submitted (in addition to a copy of its 2017 federal income tax return, discussed above), copies of bank statements from the months of January, February, and March 2019 and a list of 45 I-140 petitions their respective receipt numbers, the priority date of each petition, the name of each beneficiary, the status of each I-140 petition (some of which had been approved, others of which were pending, and some of which had been denied), and the status of the associated I-485 application of each beneficiary (for adjustment of status). However, the Petitioner provided no evidence of wages paid to any of its I-140 beneficiaries.

In his decision the Director noted that the Petitioner had not submitted any documentation of the wages paid to I-140 beneficiaries, nor any documentation of its total employee roster, as specifically

² If an S corporation, like the Petitioner, has income exclusively from a trade or business, USCIS considers its net income (or loss) to be the figure for "Ordinary business income (loss)" on page 1, line 21, of the Form 1120S. However, if there are relevant entries for additional income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K of the Form 1120S, and the corporation's net income or loss will be found in line 18 of Schedule K ("Income/loss reconciliation").

³ For a corporation net current assets (or liabilities) are the difference between its current assets, entered on lines 1-6 of Schedule L, and its current liabilities, entered on lines 16-18 of Schedule L.

⁴ The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.

requested in the RFE. The Director concluded that the Petitioner had not established its ability to pay the proffered wages of the instant Beneficiary and all its other I-140 beneficiaries from the priority date onward. The Petitioner filed a motion to reopen with additional documentation including an unaudited balance sheet as of January 31, 2019, and pay statements to various employees (not specifically identified by the Petitioner as I-140 beneficiaries or other employees) between December 2017 and May 2019. With the exception of two statements from late December 2018 none of these statements indicated the employee's wages paid for an entire year. Noting that this new documentation still did not provide all of the evidence requested in the RFE, the Director affirmed his previous decision and denied the petition.

On appeal the Petitioner submits copies of its Form 941, Employer's Quarterly Federal Tax Return, for the four quarters of 2017 and the first two quarters of 2019, along with corresponding New York State forms for the first two quarters of 2019. However, the Petitioner has still not submitted documentary evidence of the yearly wages paid to its I-140 beneficiaries since the priority date of the instant petition. Without a complete accounting of the Petitioner's other I-140 petitions and the proffered wages it is obligated to pay those beneficiaries, we cannot determine the Petitioner's total proffered wage obligation to its I-140 beneficiaries. The regulation at 8 C.F.R. § 103.2(b)(14) states that the failure to submit requested evidence which precludes a material line of inquiry shall be grounds for denying the petition. The Petitioner's failure to provide requested evidence about its other I-140 petitions and beneficiaries has precluded a material line of inquiry in this case – specifically, the Petitioner's total proffered wage obligation – and constitutes ample grounds for denying the petition.

USCIS may consider the totality of the Petitioner's circumstances, including the overall magnitude of its business activities, in determining the Petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of its net income and net current assets. We may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the petitioner's reputation within its industry, the overall number of employees, whether the beneficiary is replacing a former employee or an outsourced service, the amount of compensation paid to officers, the occurrence of any uncharacteristic business expenditures or losses, and any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

The Petitioner states on the labor certification that it commenced operations in 2009 and states on its petition, filed in January 2018, that it had 38 employees. The 2017 federal income tax return recorded gross receipts of \$5,456,053, and wage and salary payments of \$3,626,583. The Petitioner has not submitted a copy of its 2018 federal income tax return, however, and its 2019 return is presumably not yet available. The record includes a copy of the Petitioner's 2015 federal income tax return, which recorded gross receipts of \$3,268,974 and wage and salary payments of \$1,810,542. There is no record of the Petitioner's 2016 return, however, or of any return prior to 2015. Thus, the record has gaps in documentation and does not show whether the Petitioner has a sustained pattern of growth. Moreover, the Petitioner's failure to submit complete information about its proffered wage obligations to other I-140 beneficiaries, as requested, makes it impossible to determine what that dollar amount has been year by year and fatally undermines the Petitioner's claim to be able to pay all of its proffered wage obligations from the priority date of this petition onward.

Therefore, the Petitioner has not established its ability to pay the proffered wages of all of its I-140 beneficiaries from the priority date of the instant petition onward based on the totality of its circumstances, primarily because it has not presented the totality of its circumstances for consideration.

B. Beneficiary's Experience

To qualify for classification as an advanced degree professional, the Beneficiary must have at least a U.S. master's or foreign equivalent degree, or a U.S. baccalaureate or foreign equivalent degree plus five years of progressive post-baccalaureate experience in the specialty. *See* 8 C.F.R. § 204.5(k)(1). The Beneficiary must also meet the specific educational, training, experience, and other requirements of the labor certification by the petition's priority date. *See* 8 C.F.R. § 204.5(a)(2); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). In this case the labor certification requires either (1) a bachelor's degree in accounting, finance, or business administration, or a foreign educational equivalent, plus five years of experience as a controller, financial analyst, or market analyst, or (2) a master's degree and no experience.

The labor certification asserts that the Beneficiary meets the primary requirements of a bachelor's degree and five years of qualifying experience. The record shows that the Beneficiary completed a four-year bachelor of commerce with a major in business administration at the University of [REDACTED] [REDACTED] in [REDACTED] the Philippines, receiving her degree in March 1995.⁵ This degree was comparable to a bachelor's degree in business administration from a U.S. college or university. Therefore, the Beneficiary meets the minimum educational requirement of the labor certification. As for qualifying experience, the labor certification asserts that the Beneficiary exceeds the five-year requirement by virtue of her employment as a market research analyst with the Petitioner from December 2010 to October 2013 and as customer relations employees with [REDACTED] in [REDACTED] the Philippines, from April 1999 to June 2004. These two jobs, however, do not meet the labor certification's requirement of five years experience as a controller, financial analyst, or market analyst.

Even if we count the Beneficiary's job with the Petitioner as qualifying experience (section J.21 of the labor certification states that the Beneficiary gained qualifying experience with the employer in a substantially comparable position to the job offered), that job lasted less than three years. As for the Beneficiary's job with [REDACTED] from 1999 to 2004, the employment verification letter submitted with the petition states that the Beneficiary's period of employment was from September 13, 1999, to August 2, 2014, different dates than those stated on the labor certification and less than five years in total. The letter states that the Beneficiary worked as a customer relations assistant from September 1999 to June 2001 and as a teller from then until August 2004. The position of customer relations assistant was summarized as "responsible for the processing of new accounts and other related banking services following set procedures of the bank [and] assisting clients on their servicing needs." This job summary and the specific job duties listed thereafter bear little resemblance to the job duties of the proffered position of controller, as described in section H.11 of the labor certification, or to the Beneficiary's job duties with

⁵ University transcripts show that the Beneficiary took additional business-related coursework in the years 1999-2001, but did not receive any further degree.

the Petitioner as a marketing analyst, as described in the Petitioner's employment verification letter. Nor do the Beneficiary's job duties with [REDACTED] bear any evident resemblance to those of a financial analyst. Thus, the Petitioner has not established that the Beneficiary's employment with [REDACTED] in the years 1999-2004 represents qualifying experience as a controller, or as a financial analyst, or as a market analyst, as required by the labor certification.

Based on the foregoing analysis, we conclude that the Beneficiary does not have the requisite experience to meet the terms of the labor certification and to qualify for classification as an advanced degree professional based on a bachelor's degree and five years of post-graduate experience in the specialty.

III. CONCLUSION

The Petitioner has not established its continuing ability to pay the proffered wages of the instant Beneficiary and all of its other I-140 beneficiaries from the priority date of February 5, 2017, onward. In addition, the Petitioner has not established that the Beneficiary has the requisite experience under the terms of the labor certification to qualify for advanced degree professional classification. The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision.

ORDER: The appeal is dismissed.